IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

AHERN FIRE PROTECTION,

Plaintiff,

VS.

UNITED STATES POSTAL SERVICE,

Defendant.

No. 4:03-cv-40691

ORDER ON MOTION TO DISMISS

This matter comes before the Court on Defendant's motion to dismiss pursuant to Fed. R. Civ. P. ("Rule") 12(b)(1) for lack of subject matter jurisdiction and alternative motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). Plaintiff Ahern Fire Protection ("Ahern") is represented by Tracy Deutmeyer; Defendant United States Postal Service ("USPS") is represented by Gary Hayward. Plaintiff filed a motion for decision on briefs (Clerk's No. 11). Neither party requested a hearing, nor does the Court deem one necessary. Therefore, Plaintiff's motion is granted. Defendant's motion to dismiss is fully submitted and ready for disposition.

I. FACTS

Lockheed Martin ("Lockheed") was awarded a contract with USPS to act as general contractor to a project (the "Project") at the USPS bulk mail facility in Des Moines, Iowa. Lockheed contracted with Parallel Industries ("Parallel") to perform building modifications. Parallel, in turn, contracted with Plaintiff Ahern to

¹ Parallel is also known as TSSI Industries.

install a sprinkler system at a cost of \$16,216.50. Ahern alleges USPS paid Lockheed, at least in part, for the Project and that Lockheed, in turn, paid Parallel. Ahern completed its work on the Project in December 2002 but did not receive payment from Parallel. Ahern repeatedly demanded payment to no avail, and in April 2003, Parallel filed for bankruptcy protection.

On December 1, 2003, Ahern filed this action, alleging the USPS breached the Miller Act by not requiring Lockheed to secure a payment bond. Ahern argues as a result of that breach that it sustained damages in the amount of \$16,216.50 and requests the Court enter judgment against USPS for that amount plus attorney's fees and costs.

Defendant USPS filed this motion to dismiss pursuant to Fed. R. Civ. P. ("Rule") 12(b)(1), arguing that the Court lacks subject matter jurisdiction over Ahern's claim because it is subject to the Contract Disputes Act ("CDA"). Alternatively, USPS claims Ahern fails to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) because the Miller Act does not impose a duty on the Postal Service to monitor Lockheed's compliance with the statutory bond requirements.

II. STANDARD FOR DISMISSAL

"A complaint should not be dismissed unless it appears beyond a doubt that plaintiffs cannot prove any set of facts in support of their claim that would entitle them to relief." Klett v. Pim, 965 F.2d 587, 589 (8th Cir. 1992) (citing <u>United States v. Aceto Agric. Chem. Corp.</u>, 872 F.2d 1373, 1376 (8th Cir. 1989)). "[A] complaint

should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

"'[A]t issue in a factual 12(b)(1) motion is the trial court's jurisdiction — its very power to hear the case — there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist."

Osborn v. United States, 918 F.2d 724, 730 8th Cir. 1990) (quoting Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)).

"Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity" <u>United States v. White</u>

<u>Mountain Apache Tribe</u>, 537 U.S 465, 472 (2003); <u>V S Ltd. P'ship v. Dep't of Hous.</u>

<u>and Urban Dev.</u>, 235 F.3d 1109, 1112 (8th Cir. 2000) ("To sue the United States,

[plaintiff] must show both a waiver of sovereign immunity and a grant of subject matter jurisdiction.") (citing <u>Presidential Gardens Assocs. v. United States</u>, 175 F.3d 132, 139 (2d Cir. 1999)).

III. DISCUSSION

A. Contracts Disputes Act

USPS argues that this action is a contract claim against an agency of the United States and is therefore subject to the CDA, which requires such claims be brought in

the Court of Federal Claims. Ahern resists this argument, stating this action is not subject to the CDA because it was a subcontractor on the Project and it does not have a contractual dispute with the USPS.

The Postal Reorganization Act ("PRA"), 39 U.S.C. § 401(1), provides that the USPS may "sue and be sued" in its own name. "[T]he United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service." 39 U.S.C. § 409(a). Under the PRA, "the rules of procedure adopted under title 28 for suits in which the United States, its officers, or employees are parties, shall apply in like manner to suits in which the Postal Service, its officers, or employees are parties." 39 U.S.C. § 409(b).

The PRA provides a waiver of sovereign immunity allowing the USPS to "sue or be sued" in district court. <u>Id.</u> Absent a showing that Congress intended the "sue or be sued clause" to be interpreted in a narrow sense, "it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be." <u>Franchise Tax Bd. of Cal. v. United States Postal Serv.</u>, 467 U.S. 512, 517 (1984) (quoting <u>Fed. Hous. Admin. v. Burr</u>, 309 U.S. 242, 245 (1940)). "This presumption can, however, be overcome where the waiver of sovereign immunity would conflict with a 'statutory scheme' or where 'plain congressional intent' points toward a restrictive reading of the waiver." <u>Carroll v. United States Postal Serv.</u>, 764 F. Supp. 143, 144 (E.D. Mo.

1991) (citing Active Fire Sprinkler Corp. v. United States Postal Serv., 811 F.2d 747, 752 (2d Cir. 1987)).

In the present case, applying the proposition that "a precisely drawn, detailed statute pre-empts [sic] more general remedies", <u>Brown v. Gen. Servs. Admin.</u>, 425 U.S. 820, 834 (1976), the Court must decide whether the Contract Dispute Act ("CDA"), 41 U.S.C. § 601 (2000), limits the district court's jurisdiction over contract actions in which the USPS is a party.

The CDA states in pertinent part:

Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28) entered into by an executive agency for –

- (1) the procurement of property, other than real property in being;
- (2) the procurement of services;
- (3) the procurement of construction, alteration, repair, maintenance of real property; or
- (4) the disposal of personal property.

41 U.S.C. § 602(a). It is undisputed that the USPS is an executive agency for purposes of the CDA. 41 U.S.C. § 601(2). Section 605 of the CDA provides that "[a]ll claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer." 41 U.S.C. § 605(A). Moreover, section 609 allows "in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary." There is a recognized split in authority on

whether the CDA vests exclusive jurisdiction in the Court of Federal Claims in contract actions against an agency of the United States.

1. Contract Claim

As an initial matter, the Court must determine whether this action sounds in contract. RMI Titanium Co. v. Westinghouse Elec. Corp., 78 F.3d 1125, 1136 (6th Cir. 1996) (citing Megapulse, Inc. v. Lewis, 672 F.2d 959, 967 (D.C. Cir. 1982)). ""The classification of a particular action as one which is or is not 'at its essence' a contract action depends both on the source of the rights upon which the plaintiff bases its claim, and upon the type of relief sought (or appropriate)."" Id. (quoting Megapulse, Inc., 672 F.2d at 968). "Under the RMI Titanium/Megapulse test, the presence of a contractual relationship between plaintiffs and defendants does not in itself render all claims 'essentially contractual;' rather, the presence of a contract is relevant only insofar as it provides the source of the legal rights being claimed or the basis for relief."

B & B Trucking, Inc. v. United States Postal Serv., 363 F.3d 404, 413 (6th Cir. 2004).

The parties dispute whether Ahern's claim sounds in contract. USPS argues that Ahern seeks monetary damages against the federal government on a claim which arises in the context of a contract with the federal government. Ahern argues that this is not a contract action, rather "it is an action to recover the amount it is owed from the USPS because the USPS made a wrongful payment to the general contractor for the project; Ahern has an equitable lien on payment made to the general contractor because Ahern performed work on a federal project for the benefit of the USPS." Ahern

argues it did not have a contract with the USPS; it had a contract with Parallel, therefore, the CDA does not bar this Court's jurisdiction.

There are discrepancies between Ahern's complaint and its motion response. In its complaint, Ahern requests money damages – a remedy at law. In its motion response, Ahern redefines its prayer for relief as "an equitable lien" – a remedy in equity. It does not matter the label Ahern attaches to its prayer for relief; it seeks compensation for its losses due to Parallel's failure to pay, therefore, it seeks money damages. See Dep't of Army v. Blue Fox, 525 U.S 255, 263 (1999) (finding "the sort of equitable lien sought by [subcontractor] here constitutes a claim for 'money damages'; its goal is to seize or attach money in the hands of the Government as compensation for the loss resulting from the default of the prime contractor").

Next, Ahern unsuccessfully attempts to couch this action as something other than a contract action by referring to it as a "breach of the Miller Act". See Megapulse, Inc., 672 F.2d at 968. As Ahern acknowledges, it is the contract between the USPS and general contractor Lockheed that creates any potential rights under the Miller Act.²

² The Miller Act provides in pertinent part that "[b]efore any contract of more than \$100,000 is awarded for the construction, alteration, or repair of any public building or public work of the Federal Government, a person must furnish to the Government [performance and/or payment] bonds, which become binding when the contract is awarded" 40 U.S.C. § 3131(b). However, this provision does not create a cause of action by a subcontractor or a sub-subcontractor against the federal government if the government fails to require the bond(s). <u>Dep't of Army</u>, 525 U.S. at 264 ("[T]he Miller Act by its terms only gives subcontractors the right to sue on the surety bond posted by the prime contractor, not the right to recover their losses directly from the Government."); <u>Arvanis v. Noslo Eng'g Consultants, Inc.</u>, 739 F.2d

Therefore, Ahern's claim must sound in contract. First, the legal right Ahern asserts is its inability to collect the "benefit of its bargain" because the USPS allegedly breached the Miller Act. Second, the relief Ahern requests is monetary damages.

Ahern's asserted legal right as well as the relief sought sound in contract. See B & B

Trucking, Inc., 363 F.3d at 413.

2. Preemptive Effect of the CDA

The parties to this action recognize a split in authority on the issue of the preemptive effect of the CDA in cases such as the present. Compare In re Liberty Constr., 9 F.3d 800, 801-02 (9th Cir. 1993) (reasoning "Congress enacted [the CDA] to standardize the previously uncoordinated systems for resolving contract disputes with the government" but finding the CDA did not withdraw district court jurisdiction over contract claims, regardless of the amount sought, if there was an independent

^{1287, 1289-90 (7}th Cir. 1984) (finding the Miller Act does not place an affirmative obligation on the government to insist its contractors furnish Miller Act payment bonds and "grants a very narrow and specific right to those in [subcontractor's] position: the right to sue on the bond (if there happens to be one) 'in the name of the United States for the use of the person suing.'") (quoting 40 U.S.C. § 3131(b) formerly cited as 40 U.S.C. § 270b(b)).

While the Court recognizes an apparent unfairness with this outcome, that does not change the result. In <u>Arvanis v. Noslo Eng'g Consultants, Inc.</u>, the Seventh Circuit similarly noted this unfairness stating,

[[]W]e are asked to decide is who is left holding the bag when a prime contractor on a federal construction project fails to obtain a Miller Act payment bond and then defaults without paying his subcontractors. We conclude that the answer is the hapless subcontractor, not the United States.

<u>Id.</u> at 1288.

basis for jurisdiction), and Wright v. United States Postal Serv., 29 F.3d 1426, (9th Cir. 1994) ("[A]pplying <u>Liberty Construction</u> and the Supreme Court's admonition that the PRA's waiver of immunity be 'liberally construed,' we hold that the CDA does not preempt subcontractor actions against the USPS.") (citation omitted) (quoting Franchise Tax Bd., 467 U.S. at 520) with Campanella v. Commerce Exchange Bank, 137 F.3d 885, 890-91 (6th Cir. 1998) (rejecting the Ninth Circuit's analysis in <u>Liberty</u> Construction and affirming the district court's dismissal of a claim against the SBA for breach of contract stating, "the sue or be sued clause [of the SBA] is a jurisdictional grant and not simply a waiver of sovereign immunity, it is clear to us that the CDA operates to withdraw the grant") (citation omitted); <u>United States v. J & E Salvage Co.</u>, 55 F.3d 985 (4th Cir. 1995) (finding plaintiff's claims sounded in contract rather than tort and were subject to the preemptive effect of the CDA, reasoning "Congress believed that issues like the ones presented here will be most accurately and consistently resolved by a tribunal dedicated to this particular subject. This case provides a good example of the kind of government contract action that belongs within the specialized scheme provided by the CDA."); A & S Council Oil Co. v. Lader, 56 F.3d 234, 239 (D.C. Cir. 1995) (finding an action brought against the SBA by a small business for losses on their minority set aside contracts were contract claims which were grounded in the CDA and therefore the district court lacked subject matter jurisdiction); Serra v. <u>United States Gen. Servs. Admin.</u>, 667 F. Supp. 1042, 1048 (S.D.N.Y. 1987), aff'd, 847 F.2d 1045 (2d Cir. 1988) (finding the CDA "remov[ed] jurisdiction of the district

courts over actions or claims against the United States, regardless of the amount in controversy, when such actions are founded upon express or implied in fact contract with the federal government'") (quoting Chemung County v. Dole, 781 F.2d 963, 967 (2d Cir. 1986)).

The Eighth Circuit addressed whether the Tucker Act vested exclusive jurisdiction with the Court of Federal Claims in V S Limited Partnership. v. Dep't of

Housing and Urban Dev., 235 F.3d at 1112. In V S Limited, the plaintiff brought an action in district court against the Department of Housing and Urban Development

("HUD") for breach of an alleged oral modification of a forbearance agreement seeking both equitable and monetary relief in excess of \$10,000. Id. The Eighth Circuit found that exclusive jurisdiction was vested in the Court of Federal Claims for contract actions in excess of \$10,000 against the United States. Id.

Several district courts have similarly concluded the CDA vested exclusive jurisdiction in the Court of Federal Claims in actions arising out of a contract between a general contractor and the USPS where a subcontractor or sub-subcontractor sought relief from the USPS because the general contractor or subcontractor failed to pay.

See, e.g., Twin Cities Air Serv., Inc. v. United States Postal Serv., 195 F. Supp. 2d 242, 242 (D. Me. 2002) ("This is a lawsuit against the Postal Service seeking money damages for breach of contract. The plaintiff is proceeding under the Contract Disputes Act of 1978. That statute vests exclusive jurisdiction in the United States Court of Federal Claims.") (citation omitted); Spodek v. United States, 26 F. Supp. 2d

750, 755 (E.D. Pa. 1998) ("This Court finds that the CDA vests exclusive jurisdiction with either the Agency Board of Contract Appeals or the United States Court of Federal Claims over claims regarding procurement contracts entered into by an executive agency, such as the USPS.").

<u>Tradesmen International, Inc. v. United States Postal Service</u>, 234 F. Supp. 2d 1191, 1194 (D. Kan. 2002) presents essentially the same facts as the case at bar. There, general contractor Lockheed, entered into a contract with the USPS to supply and install equipment at various mail facilities. <u>Id.</u> Lockheed contracted with WestPac Electric Inc. ("WestPac") to install a portion of the equipment, and WestPac in turn, subcontracted with Tradesmen International, Inc. ("Tradesmen"). Id. WestPac failed to pay Tradesmen and eventually became insolvent. <u>Id.</u> Tradesmen brought an action against the USPS and Lockheed seeking an equitable lien on funds retained by USPS and Lockheed. Id. The district court adopted the reasoning of the Fourth, Sixth, and District of Columbia Circuits and found "that exclusive jurisdiction lies with either the appropriate agency board of contract appeals or the Claims Court over contract claims brought by contractors that fall within the ambit of the CDA." Id. at 1197. The court further reasoned, despite the conclusion of the Ninth Circuit in Liberty Construction, 9 F.3d at 801-02, "the Tenth Circuit likely would follow the reasoning of the district court opinions and hold that the CDA's preemption of district court jurisdiction extends to actions brought against government agencies, such as the Postal Service, by subcontractors like Tradesmen." Id. at 1197-98.

In sum, the combination of the broad scope of the CDA and the clear intention by Congress, as expressed in the legislative history, to streamline the means by which the government can be sued on procurement contracts leads this court to conclude that Congress intended for the CDA to preclude district courts from asserting jurisdiction over claims by subcontractors, like Tradesmen's here, against the Postal Service.

<u>Id.</u> at 1999-2000.

This Court is similarly persuaded, in light of <u>V S Limited Partnership</u>. v. Dep't of Housing and Urban Dev., the Eighth Circuit would conclude that a contract action brought by a subcontractor against the USPS is preempted by the CDA and jurisdiction lies exclusively with the Court of Claims.

IV. CONCLUSION

For the foregoing reasons, the Court finds plaintiff's claim against the USPS is preempted by the CDA. Therefore, this Court lacks subject matter jurisdiction, and Defendant's Rule 12(b)(1) Motion to Dismiss (Clerk's No. 5) must be **granted**. The Court does not reach the merits of Defendant's alternative motion for dismissal.

IT IS SO ORDERED.

Dated this 15th day of July, 2004.

UNITED STATES DISTRICT COURT